IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

No. 22,516

WILLIAM A. PORTER, *Appellant*

vs.

W. FRANCIS WILSON AND PAULINE WILSON,
Husband and Wife, and
RICHARD A. WILSON AND SHARON L. WILSON,
Husband and Wife, *Appellees*

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FOR THE NINTH CIRCUIT

WILLIAM A. PORTER Appellant VS. W. FRANCIS WILSON AND PAULINE WILSON, Husband and Wife, and RICHARD A. WILSON AND SHARON L. WILSON, Husband and Wife Appellees	)	NO. 22,516

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit has jurisdiction of this case pursuant to 28 U.S.C.A., Section 1291, on an Appeal of a final decision by the District Court for the District of Arizona, Phoenix Division and pursuant to 28 U.S.C.A., Section 1294, as an appeal to the Court of Appeals for the Ninth Circuit encompassing the District of Arizona, on the action of the District Court of Arizona in granting Appellees' Motion to Dismiss which was a final, appealable decision of the District Court of Arizona to this Court.

Respectfully submitted,

HOOPER, STEVES & KERRY
200 Fort Worth Club Building
Fort Worth, Texas 76102

By: _____
Sterling W. Steves

ATTORNEYS FOR APPELLANT

I certify that on the 11th day of March, 1968, I sent, by certified mail, three copies of the above Statement of Jurisdiction to the attorney for Appellees, the Honorable Richard A. Wilson, at his last known address which was at the offices of Lutich, D'Angelo & Wilson, 3120 North Third Avenue, Phoenix, Arizona.

_____
STERLING W. STEVES

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Brief for Appellant

STATEMENT OF JURISDICTION

The District Court had jurisdiction of this case as a diversity action between citizens of different states involving a controversy in excess of $10,000 exclusive of interest pursuant to 28 U.S.C.A. 1332(a). (Complaint, TR. 1-3.)

STATEMENT OF THE CASE

In 1961 Pearline Porter, Pauline P. Leonard and William A. Porter doing business as the Continental Hotels System, a co-partnership, instituted suit in this cause against W. Francis Wilson and Pauline Wilson, his wife, and Richard A. Wilson and Sharon L. Wilson his wife, to quiet title to real property in Phoenix, Maricopa County, Arizona. The property is known as the "Arizona Hotel" and is located in downtown Phoenix.

The Plaintiffs (only one, William A. Porter, is the Appellant in this appeal) asserted fee title through a deed from Mrs. Gladys Porter, the former wife of William A. Porter, through a conveyance allegedly made by Mrs. Gladys Porter to the Defendants Wilson.

The Defendant answered and admitted they claimed an interest in the Arizona Hotel and alleged that Gladys Porter acquired the interest of William A. Porter by sale of execution on execution on the 20th day of August, 1959 and that Defendants acquired their ½ interest in said property by deed from Gladys Porter on May 4, 1960. Defendants asserted they had good title to the property by said deed. Defendants also asserted that the federal district court did not have jurisdiction because of a prior case, Cause No. 55179, pending in the Superior Court of Maricopa County, Arizona.

Both the Plaintiffs and the Defendants moved for summary judgment on the grounds that prior actions were res judicata.

BACKGROUND OF PRIOR ACTIONS IN ARIZONA

William A. Porter and Gladys were residents of Kootenai County, Idaho. They had been married in 1940 in Detroit, Michigan. In 1943, Gladys and Arnold, as he is known, and Pearline and Pauline, his sisters, formed a partnership concerning the operation of the hotels owned by the parties. In August 1943 a deed was executed conveying title to the Ari-

zona Hotel to Gladys and Arnold (no mention was made of any interest of the Porter sisters).

In December 1958, Gladys left Idaho and after a short visit in California came to Phoenix and in February 1959, instituted a Complaint for Separate Maintenance, alleging Arnold was a resident of Arizona. She also alleged the hotel was community property. An attachment was issued which was levied upon the Arizona Hotel. The Porter sisters intervened in the Maricopa County action alleging the hotel was partnership property and that the sisters owned a $\frac{1}{3}$ interest total therein. Gladys petitioned for a receiver and she also filed a counterclaim against the Porter sisters as intervenors. A receiver was appointed to run the hotel and later, on May 14, 1959, a decree of separate maintenance in favor of Gladys against Arnold was granted. Arnold never appeared in the separate maintenance action and was never personally served.

IDAHO

On May 25, 1959, Arnold filed a complaint for divorce against Gladys in the 8th Judicial District Court, County of Kootenai, Idaho. (Tr. 16-26) Gladys personally appeared, answered and filed a cross action for a divorce. (Tr. 27-51).

Back in Arizona, the Maricopa County Superior Court ordered the Receiver of the Arizona Hotel to pay Gladys $1,000 per month for her support and that of the minor children of the parties.

A Writ of Execution was issued in Maricopa

County and in August, 1959, Gladys purchased the hotel from the Sheriff. The Sheriff's deed conveying the Arizona Hotel property was given to Gladys.

Back in Idaho, the Porter sisters intervened. All parties were before the Idaho Court in personam.

On May 4, 1960, during the trial of the Idaho case before the Court, Gladys executed the deed to the Wilsons conveying to them an undivided ½ interest in the Arizona Hotel.

On December 28, 1960, the findings of fact and conclusions of law of the Idaho divorce decree were entered. (Tr. 53-64, 66-74). Gladys was awarded the bulk of the community property. The Idaho Court found the Arizona Hotel was partnership property and required Gladys to convey her interest in the Arizona Hotel to Arnold and the sisters. Gladys appealed that portion of the decree to the Idaho Supreme Court. The Idaho Supreme Court upheld the Idaho divorce decree in *Porter v. Porter,* 84 Idaho 400, 373 Pac. 2d 327 (1962).

BACK IN ARIZONA

In Arizona, the Porter sisters filed a Supplemental Complaint in Intervention and prayed that full faith and credit be given to the prior Idaho judgment.

The Arizona separate maintenance action was tried before a jury on December 18, 1961. At the trial only documentary evidence was introduced but it was rejected upon Gladys' objection. (Tr. 53-64, 66-74). The deeds from Gladys to Arnold and the

two Porter sisters were received in evidence, as well as a release of the Arizona decree of seperate maintenance entered by the Maricopa County Superior Court on May 14, 1959. A directed verdict was entered by the Court in Gladys' favor.

A judgment was entered that the sisters take nothing and that Gladys recover her costs. The trial court was reversed by the Arizona Court of Appeals, Division One, which was itself reversed by the Arizona Supreme Court in a split decision. *Porter v. Porter*, 101 Ariz. 131, 416 Pac. 2d 564, cert denied.

The Defendants' Motion for Summary Judgment was predicated on the theory that the opinion of the Arizona Supreme Court in *Porter v. Porter* was res judicata. (Tr. 78).

The Plaintiffs claim that the prior judgment of the Idaho Supreme Court was res judicata (Tr. 77) under the doctrine of *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 84 L.Ed. 85 (Tr. 7-15).

The Defendants' Motion for Summary Judgment or to dismiss for failure to state a claim was set for hearing before the federal court in Phoenix on June 12, 1967. Appellant, William A. Porter's counsel, Sterling W. Steves, moved for a continuance on the grounds that he was already under orders of the VIII United States Army Corps to report on June 10, 1967 to Fort Chaffee, Arkansas for two weeks of active duty. (Tr. 83, Affidavit Tr. 84-86). Counsel for the sisters, Mr. Paul Beer, was present at the hearing on June 12, 1967.

The Motion for Continuance was denied and the Defendants' Motion for Summary Judgment came on. The Court dismissed the Complaint for the reason that there was no issue to try. (Tr. 87).

Appellant moved for a new trial on the grounds, inter alia, of failing to grant the Motion for a Continuance, (Tr. 89) and failure to give full faith and credit to the Idaho decree. The Court denied the Motion on the ground the Court was required to follow the conflict of law rules promulgated by the Supreme Court of Arizona. (Tr. 91).

This Appeal followed.

The Arizona Hotel property has now been sold by the Wilsons and Gladys to the City of Phoenix. (Tr. 99).

SPECIFICATION OF ERRORS

POINT OF ERROR I

The Trial Court erred in failing to grant Appellant's Motion for a Continuance.

POINT OF ERROR II

The Trial Court erred in failing to resolve a conflict between court decisions in different states by applying the Constitutional Principles of "Full Faith and Credit."

POINT OF ERROR III

The Trial Court erred in holding that the Idaho judgment is not entitled to Full Faith and Credit and is res judicata as to each and every ground, jurisdictional and otherwise.

POINT OF ERROR I (Restated)

The Trial Court erred in failing to grant Appellant's Motion for a Continuance.

This case had been pending for approximately 6 years on the docket of the federal court in Phoenix. The Defendants filed their Motion for Summary Judgment in April, 1967. The Court set the Motion down for hearing on June 12, 1967. A change in Appellant's Counsel occurred in late May, 1967.

Appellant's lead counsel became Sterling W. Steves. The case had originally been set for argument at an earlier time and then, on the court's motion, changed

to June 12, 1967. A Motion for Continuance was immediately filed on the grounds counsel had been previously ordered by VIII United States Army Corps to report to Fort Chaffee, Arkansas, on June 10, 1967. (Tr. 84-86) The Motion was denied and the hearing held anyway, with the result that Defendant's Motion to Dismiss was granted, *with prejudice.*

It is respectfully urged that the lower court erred in denying the Motion for Continuance in such circumstances.

No injury would have been sustained to any party by granting such Motion and the circumstances were clearly beyond counsel's control.

Had any party been in the military service, a continuance would have been in order pursuant to 50 U.S.C.A. Sect. 521. Why not grant such a Motion when Counsel cannot be present? The failure to grant such Motion for Continuance deprived William A. Porter the right of counsel to be heard at the time the Court dismissed his case. It is submitted without belaboring the point, the trial court abused his discretion. *Velvestad v. Flynn*, 230 F. 2d 695 (CA 9th, 1956); *Ockert v. Union Barge Line Corp.*, 190 F.2d 303 (CA 3rd, 1951), 15 Fed. R. Service, 41a.22, case 2; *Merrit Chapman & Scott v. Kent*, 309 F.2d 891 (6th Cir., 1962) cert dismissed 83 S. Ct. 1118; 17 *C.J.S.* "Continuances", Sect. 37.

POINT OF ERROR II (Restated)

The Trial Court erred in failing to resolve a conflict between court decisions in different states by applying the Constitutional Principles of "Full Faith and Credit."

The resolution of such a conflict, as in this case, must evolve from a consideration of the constitutional principles underlying federalism and not from a mere preference for the state in which the forum Federal Court happens to be located. A Federal District Court faced with a conflict between state courts must base its decision upon the constitutional and statutory requirements of federalism, namely full faith and credit. Regrettably without any discussion of its rationale, the District Court below chose to give preference to the decision of the Arizona Supreme Court over a decision of the Idaho Supreme Court.

The Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Article IV, Section 1 of the Constitution of the United States provides as follows:

> "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Congress of the United States specifically directed Federal Courts to enforce the judicial proceed-

ings of another state in the state in which that Federal Court resides. The pertinent portions of 28 *U.S.C.A.*, Section 1738, provide:

> ". . . judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken . . ."

This statute directs that if the principles of full faith and credit require that the Idaho judgment be enforced in Arizona, then the lower Federal Court must enforce that judgment regardless of any decision by the Arizona Supreme Court.

The Supreme Court in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1940), confirmed a decision of the 9th Circuit wherein that court resolved inconsistent state judgments as to the ownership of Sunshine stock. A Superior Court in Washington State adjudged in a probate action that the stocks were the property of John Pelkes. A District Court in Idaho held that the same property belonged to Katherine Mason. Because of the conflict of the judgments, the Sunshine Mining Company filed an interpleader action in the Federal District Court of Idaho to determine which of the parties should receive the stock and dividends.

Although the Supreme Court eventually declared the Idaho District Court's decision as paramount over the Washington State decision, they did not predicate such action on the ground that an Idaho Federal

Court is bound, in resolving such a conflict, to the decision of an Idaho Court. The relevant consideration is the "full faith and credit" clause of the Constitution:

> ". . . on account of conflict between the judgments of the respective court's of sister states and the assertion of the failure to give full faith and credit to both in the interpleader action, we grant certiorari." 308 U.S. at 68.

In *Durlacher v. Durlacher*, 123 F.2d 70 (9th Cir. 1941), the 9th Circuit resolved a conflict between the States of New York and Nevada. Mrs. Durlacher first obtained a support order from a New York Court. She was then divorced by her husband in Nevada. After the divorce the New York Court gave her three maintenance judgments, on which she sought execution in the Federal District Court in Nevada. Mr. Durlacher maintained that the Federal District Court should apply the law of Nevada since it resided in Nevada. The 9th Circuit rejected this view at page 72:

> "Simon contends, however, that such faith and credit should not be given it since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada law is claimed to be that, upon the dissolution of the marital tie, the Court in which the prior maintenance proceeding was pending lost jurisdiction to render a judgment for maintenance sums. Cf. Herrick v. Herrick, 55 Nev. 59, 25 P.2d 378. That is to say, the Nevada Federal Court could refuse to recognize the New York judgment because

repugnant to Nevada law.

> "The Supreme Court has repeatedly held that under the full faith and credit clause of the constitution (extended by the Statute to the Court below), a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the state requested to enforce it . . . (Citations)

The 9th Circuit affirmed the *Durlacher* opinion in *Bassett v. Bassett*, 141 F.2d 954 (9th Cir. 1944). Once again the wife received a separate maintenance order from the New York Courts. The husband received a divorce in Nevada which purported to release him from the New York maintenance order. The wife received New York judgments for maintenance payments accrued subsequent to the Nevada divorce. The Federal District Court in Nevada had to resolve the conflicting state decrees concerning the enforcibility of a New York maintenance decree after a Nevada divorce.

Once again the Nevada Federal District Court was directed by the 9th Circuit to resolve the conflict by full faith and credit, and not by local state loyalty. The 9th Circuit held that full faith and credit required that the New York decree be enforced.

> "In the case of *Durlacher v. Durlacher*, 9th Cir., 123 F2d 70, we reviewed the procedure of the New York Court in circumstances substantially identical to those herein and held that since the judgment entered in the New York Court was in all respects a valid judgment, it could not be

set aside or affected by a judgment of a court of another state . . ." 141 F2d at 955.

The relevant consideration for this court, then, is whether the Idaho decree is entitled to full faith and credit in the Federal District Court in Arizona.

POINT OF ERROR III (Restated)

The Trial Court erred in holding that the Idaho judgment is not entitled to Full Faith and Credit and is res judicata as to each and every ground, jurisdictional and otherwise.

Gladys Porter appeared personally and by counsel in the Idaho proceeding and participated therein, indeed to the extent of counterclaiming for and obtaining a divorce in her favor. Not only did she not contest the jurisdiction of the court over the hotel property, she herself alleged it to be community property and prayed for a division thereof. Nor did she raise any other objection going to the jurisdiction of that court to entertain the divorce action. The only portion of the trial court's decision that she appealed to the Idaho Supreme Court was the order enjoining her from instituting or maintaining any Arizona action against her former husband or intervenors affecting the Arizona Hotel properties. The Idaho Supreme Court ordered the trial court to amend that portion of its decree. She did not appeal the division of property or any other portion of the divorce decree.

Gladys then returned to Arizona and attacked the

Idaho judgment as being invalid and not entitled to full faith and credit. In an opinion devoid of any mention of developed principles of res judicata and full faith and credit, a majority of that Court upheld her attack. Those constitutional principles, discussed immediately below, necessarily require the lower federal court to levy execution on the Idaho judgment.

Although the Full Faith and Credit Clause of the Constitution does not prevent one State's courts from allowing a party to collaterally attack an ex-parte sister-State judgment for lack of jurisdiction, *Williams v. North Carolina*, 325 U.S. 226, 65 S. Ct. 1092, 89 L.Ed. 1577 (1945), the rule is quite different when such an attack is made upon the other judgment when the complaining party appeared therein and participated in procuring the judgment. In the latter instance, as in the case at bar, the first judgment is entitled to full faith and credit, is res judicata as to all issues, including those of jurisdiction, and cannot be attacked collaterally where such an attack would not be allowed in the State of rendition. *Johnson v. Muelberger*, 340 U.S. 581, 587, 71 S.Ct. 474, 95 L.Ed. 552 (1951). In *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948), which held that a foreign divorce decree could not, under these circumstances, be attacked for want of jurisdiction over the subject matter, the Supreme Court elaborated at length upon the controlling principles:

> "The requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister-State where there has been participation

> by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree . . .
>
> "If respondent failed to take advantage of the opportunities afforded him the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister-State on a decree valid in the state in which it was rendered." 334 U.S. at 351-52.

The subsequent case of *Coe v. Coe*, 334 U.S. 378, 68 S.Ct. 1004, 92 L.Ed. 1451 (1948), applied the *Sherrer* rule where the defendant spouse appeared but failed to raise any objection to the jurisdiction of the court over the subject matter.

In order for the prior foreign decree to constitute res judicata, nothing more is required than that an opportunity be provided the defendant to contest the Court's jurisdiction. It matters not that he chooses not to do so or neglects to do so. *Cf. Chicot County Drainage District v. Baxter*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940). The foreign judgment is conclusive as to all issues that were or could have been litigated.

The Ninth Circuit articulated the rule that a foreign State's judgment may be collaterally attacked only if such judgment is subject to collateral attack in said foreign state in *Durlacher v. Durlacher*, 123

F.2d 70 (9th Cir. 1941). Mrs. Helen Durlacher obtained a separate maintenance decree in New York. Subsequently, Mr. Simon Durlacher obtained a divorce in Nevada. This action in turn was followed by a suit in New York by Mrs. Durlacher for support payments accrued since the Nevada divorce. Simon failed, in the New York Court, to raise the question of New York's jurisdiction after the Nevada divorce. Under New York law, the failure to raise the jurisdictional issue at the trial, precluded collateral attack. Thus, when Mrs. Durlacher returned to the Nevada Federal Court, Mr. Durlacher was precluded from collaterally attacking the New York judgment. As the Ninth Circuit stated at page 71-72:

> "Nevertheless in New York Simon [Durlacher] could have brought a suit in which he would have been entitled to show that the court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen from procuring execution or suing on her New York judgment in the maintenance proceeding. However, he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the loss of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that state. New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction."

The Ninth Circuit articulated this same position in

Bassett v. Bassett, 141 F.2d 954 (9th Cir. 1944), a case very similar to the one before this Court. Mrs. Bassett secured a separate maintenance order from the State of New York against her husband. Later Mr. Bassett received an absolute divorce in the State of Nevada. The Nevada decree purported to release the husband from any further support payments under the New York judgment. Later Mrs. Bassett sued and received a judgment in New York for support payments accrued since the divorce. As in this case, Mr. Bassett chose not to raise the first state's decree in the second state. Mrs. Bassett sued in the Nevada Federal District Court for execution on the New York judgments. That Court dismissed the action on the ground that the Nevada decree was res judicata. The Ninth Circuit reversed on the ground that since the New York Court possessed jurisdiction of the parties, the only place Mr. Bassett could attack the New York decree was in New York, as the Court stated at page 955:

> ". . . The State of New York had acquired jurisdiction over both parties to this appeal in the original separate maintenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgements questioned here. In those proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the original decree and been unsuccessful, his recourse would have been in the Appellate Courts of New York and the Supreme Court of the United States.

> "As here presented we are asked to accept the decree of a Nevada State Court which, in effect, attempts to set aside decrees or judgments of a Court of New York. . . ."

As in *Bassett* and *Durlacher*, Gladys Porter was subject to the jurisdiction of an out of state court, in this case Idaho, and failed to raise the jurisdictional question. As in *Bassett* and *Durlacher* she later raised that question in the first State, in our case Arizona. The *Bassett* and *Durlacher* cases, conclusively establish that the original state must honor the second State's decree, regardless of what defenses could have been raised in the other state assuming, as here, that the decision is not subject to collateral attack in the first State.

One of the primary arguments of the majority opinion in the Arizona collateral attack is that the Idaho court did not have jurisdiction to directly affect Gladys' separate property in Arizona. There are two answers to this contention. First, since Gladys herself executed the deeds to the Arizona property, the Idaho court did not "directly affect" title to Arizona realty. *Kennedy v. Morrow*, 77 Ariz. 152, 268 P.2d 326 (1954). See *Fall v. Eastin*, 215 U.S. 1, 8, 11-12, 30 S. Ct. 3, 54 L.Ed. 65 (1909). Secondly, the Idaho court determined for itself from the parties' pleadings that it had jurisdiction to order Gladys to convey her interest in the property and it is now settled that the adjudication of facts affecting title to land located in another State becomes res judicata and is entitled to full faith and credit in the State in which the land is situated.

The United States Supreme Court has discussed the effect of an in personam judgment concerning real property in a case concerning land lying between Nebraska and Missouri. The Nebraska court litigated the matter and the losing party went to Missouri claiming the land was located in the State of Missouri. The United States Supreme Court in *Durfee v. Duke*, 175 U.S. 106, 84 S.Ct. 242, 11 L.Ed. 2d 186, (1963), stated:

> "With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Traveling Men's Assn., 283 522. There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that question had been fully litigated in the Missouri forum. 'Public policy,' said the Court, 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.'" 283 U.S., at 525-526.
>
> "Following the Baldwin case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction

> over the subject matter. Davis v. Davis, 305 U.S. 32; Stoll v. Gottlieb, 305 U.S. 165; Treinies v. Sunshine Mining Co., 308 U.S. 66; Sherrer v. Sherrer, 334 U.S. 343. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to re-try the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in the subsequent action between the parties." [Footnotes omitted]

The Court concluded by saying this rule of jurisdictional finality should apply to a case involving real property as between the parties to the litigation.

Relying upon recent constitutional precedent, the American Law Institute has addressed itself anew to this very problem. In *Restatement of the Law* (Second), *Conflict of Laws* (Tent. Draft No. 10) (1964), Sec. 430d, it is stated:

> "When a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the local law of the State where the judgment was rendered determines, subject to constitutional limitations, whether the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the subject matter."

In Comment (c) to the above Section, the Institute concludes that:

> "Due process does not prevent a State from impinging on the interests of a sister-State by ap-

> plication of rule that parties who were subject to the jurisdiction of the court cannot collaterally attack the judgment for lack of jurisdiction over the subject matter."

Having participated fully in the Idaho proceedings, but having failed to claim jurisdictional error there, one must look to Idaho law in order to ascertain whether Gladys is entitled to collaterally attack its decree on the grounds invoked by the majority opinion. In *Treece v. Treece*, 84 Idaho 457, 373 P.2d 750 (1962), that court stated that a divorce decree regular upon its face could not be attacked collaterally by a party except on the ground of extrinsic fraud. Said judgments are held to be conclusive as between the parties on all issues determined or which should have been determined thereby. See also *Robinson v. Robinson*, 70 Idaho 122, 212 P.2d 1031 (1949). Having pleaded that the hotel property was community property, thereby giving that court jurisdiction to divide it, the judgment is regular upon its face. Neither Gladys nor the majority opinion in Arizona suggest that the proceedings there were had as a result of fraud. Thus, since Gladys could not collaterally attack the decree in Idaho, she cannot do so in Arizona.

Therefore, the Idaho divorce decree is res judicata on the questions of whether the hotel property is or was community property or her separate property and as to the validity of the trial court's order compelling her to convey her interests therein to the partners. Even if the Idaho court erred in refusing to enforce the accrued installments, and even if Gladys had indeed placed the facts of the Arizona

sheriff's sale before that court and the latter had erroneously refused to give such "proceedings" effect, the Idaho decree is nonetheless entitled to full faith and credit. Retaliation by the courts of Arizona is fundamentally inconsistent with notions of full faith and credit.

The United States Supreme Court has passed on just such a question on several occasions. The leading case is *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939). In *Treinies*, the Idaho court, with both parties before it, conferred title to certain personal property upon A, after first finding that a prior Washington judgment between the parties which awarded the property to B was not entitled to full faith and credit because of a jurisdictional defect. In a third action between A and B, B attempted to rely upon the original Washington decree. The United States Supreme Court held that B was not entitled to rely on the Washington judgment:

> " . . . because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of [B] in the Washington proceedings, the right to review that error was in those (the Idaho) proceedings. . . .
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

> "One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties." 308 U.S. at 76-78 (citations and footnotes omitted and emphasis added.)

Treinies is on all fours with the instant case and should control its disposition. Justice Udall acknowledged this in his Arizona dissent and the unanimous Court of Appeals in Arizona recognized that it was bound by the *Treinies* principle. *Porter v. Porter*, 101 Ariz. App. 363, 403 P.2d 298 (1965).

Subsequent Supreme Court decisions have adhered to the *Treinies* doctrine. In *Sutton v. Leib*, 342 U.S. 402, 72 S.Ct. 398 (1952), a federal court applying Illinois law in a diversity case was required to give full faith and credit to a New York Court's finding that impeached the jurisdiction of a Nevada ex parte divorce since the New York judgment was res judicata. The Court stated the New York "decree is entitled to full faith throughout the nation, in Nevada as well as in Illinois." In *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451 (1947), the State of Illinois was required to give full faith and credit to a Missouri judgment which was subsequent to an Illinois court order staying all suits against an unincorporated insurance company. In *Roche v. McDonald*, 275 U.S. 449, 48 S.Ct. 143, 72 L.Ed. 365 (1928), a decision predating *Treinies*, the Court said:

> "If McDonald desired to rely upon the Washington statute as a protection from any judgment [in Oregon] . . . he should have set up that sta-

> tute in the court of Oregon and submitted to that court the question of its construction and effect. And even if this had been done, he could not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive in the court of Washington, and under the full faith and credit clause should have been enforced by them." 275 U.S. at 455.

This position is consistent with current judicial trends. Modern-day federal and State court decisions recognize that the State whose earlier judgment was denied full faith and credit by a sister-State court cannot for that reason refuse to recognize and enforce as res judicata the out-of-State decree.

For example in *Southard v. Southard*, 305 F.2d 730 (2nd Cir. 1962) (Noted in 65 W.Va. L.Rev. 220), the court held that a divorce proceeding in Connecticut, which failed to give full faith and credit to a Nevada divorce, was valid. The only factor needed to be shown was that the Connecticut Court possessed jurisdiction. As the court said on page 732.

> "It is clear from the appellant's complaint that—as he admits in his brief on this appeal—he entered an appearance in the Connecticut divorce action the outcome of which he here seeks to attack. His person was thus under the jurisdiction of the Connecticut court, and there are no allegations which could support collateral attack on the judgment. Whether or not the appellant subsequently defaulted as to the further proceedings leading up to the judgment, and whether or not he was deprived of rights by errors of the

> Connecticut court, our determination that that court had jurisdiction over him and the case precludes any further attack on the judgment" Morris v. Jones, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1947).

In *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987 (1957), the husband had obtained an ex parte divorce in Nevada but failed to set it up as a defense to an Illinois divorce action brought by the wife. Having obtained her Illinois divorce, she next sued the husband in California for accrued support payments. The husband then claimed that the Illinois decree was void for want of jurisdiction over the marriage because of the earlier Nevada decree. A unanimous California Supreme Court, per Traynor, J., stated:

> "The first answer to this contention is that it should have been invoked in the Illinois proceeding and that even if the Nevada decree had been pleaded as a defense in that proceeding and the Illinois court had erroneously failed to recognize it, defendant's remedy was by appeal and he cannot now attack the Illinois judgment." [citing *Treinies*, supra.] 49 Cal.2d at 393, 317 P.2d at 990.

The majority opinion in the Arizona Supreme Court states "full faith and credit clause does not compel us to overrule our decision by recognizing the Idaho judgment were we to concede its validity." Such a statement completely ignores the simple operation and effect of full faith and credit. For if the validity of the Idaho decree were to be conceded, then it becomes res judicata as between the parties thereto as

regards all the issues determined and all the issues that could have been determined therein. The *Restatement of the Law*, Judgments, Sec. 42, describes the effect of the second judgment on a prior inconsistent judgment:

> "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."

Subsection (e) of Sec. 42 provides:

> "The rule stated in this Section is applicable not only where the actions are brought in the same State, but also where they are brought in different States."

(See Justice Udall's dissent, 101 Ariz. 131, 416 P.2d 564.

The *Restatement of the Law* (Second), *Conflict of Laws*, (Tant. Draft No. 10, 1964), provides:

> "Sec. 439a. Inconsistent judgments. A judgment will not be recognized or enforced in other States if an inconsistent, but valid judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment is rendered."

Comment (a) to the above Section states that the rule is applicable even though the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law. Comment (e) notes that the rule is one of constitutional law as between the States. The State cases

cited by the majority in the Arizona Supreme Court for the proposition that the subsequent, valid out-of-State judgment does not supersede the prior Arizona determination on the same issue (*Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019 (1962), cert. denied, 371 U.S. 888; *Perry v. Perry*, 51 Wash. 2d 538, 318 P.2d 968 (1958) and *Hammell v. Britton*, 19 Cal.2d 72, 119 P.2d 333 (1941) have been uniformly and roundly criticized as being inconsistent with principles of res judicata embodied in the Full Faith and Credit clause. See, e.g., Note, 31 *Geo. Wash. L. Rev.* 648 (1963); Note, 15 *Stan. L. Rev.* 331 (1963); Note, 16 *Vand. L. Rev.* 193 (1962). The California decision in that group, *Hammel v. Britton*, supra, should be viewed in light of the more recent opinion of that court discussed above, *Lewis v. Lewis*, supra, where the *Treinies* rule is invoked in a similar situation.

Finally, objections that the Idaho court had no jurisdiction to entertain the intervention action either because the Idaho rules of procedure did not permit the intervention action or because the partnership itself was not a party before the Court, are unavailable to Gladys for the same reason. Having participated in the action, the principles and authorities discussed above require that Gladys has presented her objections in that proceeding at that time. Having failed to do so, the judgment is res judicata on all questions of law, including jurisdiction to entertain Appellant Porters' intervention action. *Miliken v. Meyer*, 311 U.S. 457, 462, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

CONCLUSION

For the reasons stated and discussed above, the Court should reverse the dismissal below and render judgment for Appellant.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules. Dated at Fort Worth, Texas the_____March, 1968.

Sterling W. Steves